NO. 48802-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JESSE LEO ARNESTAD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Michael Schwartz

No. 15-1-00094-4

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is defendant's claim of insufficient evidence wrongly based on fingerprint-only cases involving movable objects as his burglary and theft convictions were proved through a print he made on a bedroom closet door, hand injuries consistent with blood smeared in the closet, manifested consciousness of guilt and a drug-related connection to former occupants evicted from the home?

2. Should the premature request to pass appellate costs along to taxpayers be denied when a cost bill has yet to be filed and defendant should repay the public for his appeal?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant proceeded to trial charged with residential burglary for breaking into Mrs. Hwa Park's Tacoma home with the intent to commit a crime and first degree theft for stealing her valuables while inside. CP 2-4. Multiple offense aggravators were added, so his high offender score would not result in unpunished crimes. *Id.* The proof challenged on appeal as insufficient consisted of 24 exhibits and the testimony of 6 witnesses. CP

28-31, 108.[1] A jury properly instructed on the law, to include accomplice liability, convicted him as charged. CP 26-27; CP 39 (Inst. 5), 44 (Inst. 10), 48 (Inst. 14). He had an offender score of 12 for the burglary and 11 for the theft. CP 82. The score was a product of him committing his crimes on community custody combined with his long criminal career, consisting of convictions for drive-by shooting, residential burglary, third degree assault, firearm theft, unlawful firearm possession, stolen vehicle possession, failure to remain at injury accident, malicious harassment and possession of meth. A sentence of 84 months was imposed. The court was concerned defendant was committing felonies while involved in a program designed to aid him in "becoming a productive member of society." 4RP 618. And also because:

> [T]here was a significant loss to [the victims]. Mrs. Park, you know, she is not a rich woman. That's pretty much everything she owns is probably tied up in that house there and [defendant] invaded the sanctity of that property, [] her sanctuary.

4RP 618. Defendant's notice of appeal was timely filed. CP 98.

2. Facts

Mrs. Park is Tacoma resident of Korean descent who speaks little English, yet raised two children, purchased a one story home with her husband and contributed to her family by leaving that home at 5:45 a.m.

[1] Citation to CP over 107 reflect estimated numbering of supplemental designations.

for her job at JBLM restaurant. 2RP 196-98, 202-03, 223; 3RP 316. Her husband, Young Park, is also a contributing member of our community, who left home with his wife at the same time for his job at a warehouse. 2RP 198. It is a routine familiar to their unemployed 30 year old daughter, Padgett, and her unemployed ex-boyfriend—*defendant's friend*—Brandon O'Neal. 2RP 199-202, 275-76, 281, 283; 4RP 452-61.

Mrs. Park did not know defendant, did not recognize him in court, nor had she heard his name before trial. 2RP 258-59. He had never been invited into the home, and there is no proof he was given legitimate access to it by another. 2RP 259, 265; 280; 4RP 454. At trial, Park conceded the possibility people could be brought into her home without her knowledge while she was away. 2RP 265, 280. Padgett, on the other hand, had limited contact with defendant before the burglary as he once answered a call she placed to O'Neal's phone. 4RP 454. But she also knew defendant was not ever invited into her parent's home. 4RP 454-55, 490, 492-93.

Events leading to the burglary for which defendant was convicted show a kindness the Parks extended to O'Neal paved the way for at least defendant to break into their home. Padgett began living in the home with O'Neal sometime around the summer of 2014. 2RP 199-200. Mrs. Park came to suspect they were using drugs. 2RP 200, 266. They appeared sick, spent their days in bed. 2RP 200, 274-75. O'Neal left at night, returning with strange property Park suspected was stolen but O'Neal claimed to be selling as part of a business operated by a friend's father. 2RP 200, 274-75,

279. Park kicked O'Neal out of the home sometime in the fall before the burglary. 2RP 201. Padgett was sent packing shortly after. 2RP 201. Neither returned their house keys as Park requested;[2] nevertheless, neither had permission to enter the home when it was burglarized October 28, 2014. 2RP 201-03, 252-53, 261-62; 4RP 453-54, 488-89.

That day began for the Parks like so many others. They had been living together without others in the home. 2RP 202, 260-61; Ex. 3. They set out for work at 5:45 a.m. 2RP 202-03. Mrs. Park, approximately 50 years old at the time, returned a little past 2:00 p.m. to find their flat-screen TV missing from the living room wall. 2RP 202-04, 240; 3RP 316; Ex 37. She walked into her adjacent bedroom "to find [] it [] in shambles." 2RP 206; Ex. 23-25, 28. Clothes from her closet were strewn across her bed. 2RP 206, 226. A basket containing baby pictures with other items had been removed from the top of her closet safe, then tossed in a way that scattered its contents all over the floor. 2RP 226-27; Ex. 25.

The two sliding-mirror doors to her closet had been removed from their tracks. 2RP 230-31; 3RP 321-22; Ex. 28, 30. There were previously nonexistent holes in the drywall as if the thief broke through the closet walls to steal the safe. *Id.* There were "two spots" of "blood" not present when the Parks' left "smudged" on the closet wall to the right of one hole and below another consistent with a thief sustaining an injury while taking the safe. 2RP 234-35, 237; Ex. 30-31. Damage from the safe's mounting

[2] Padgett claimed O'Neal lost his key before the burglary. 4RP 489.

screws being torn from the wooden floor was present. 2RP 231-34, 236-37; Ex. 32. And the safe Park used to store "precious" items was missing. 2RP 206-08, 226-27; Ex. 28. It contained her wedding ring, jewelry given to her over the years, $1,000 in cash, birth certificates, financial paperwork, passports and the like. 2RP 208-10. In total, the Parks lost near $20,000 in valuables their insurance company did not fully cover through its $15,000 payout. 2RP 211, 256-58, 276.

There were no signs of force capable of overcoming the home's locked exterior doors or windows. 2RP 213-14, 238-39, 260; 3RP 316-17; Ex. 2, 9. Some new scratches were present on an exterior door that could not account for entry. 2RP 239, 264; 3RP 316-17, 320; Ex. 2, 39-40, 50. Although the closet concealing the safe was ransacked, her dresser drawers were undisturbed. 2RP 206; 3RP 327; Ex. 24. As were other rooms in the home. 2RP 224-25, 241. Leaving the burglary precisely targeted at the TV, Mr. Park's computer and Mrs. Park's safe. 2RP 206-13; 3RP 321. Padgett and O'Neal knew where the Parks' valuables were before the burglary. 2RP 211-12, 4RP 490. At least Padgett knew the security camera was not operational. 2RP 277-78.

Mrs. Park immediately reported the burglary to police. 2RP 251; 3RP 312-13. They responded to investigate. 3RP 314-24. A forensic technician found a latent print on the mirror side of a closet door that had concealed the safe. 3RP 322-23; 339-35, 344-46, 350-51; Ex. 28; 51. The

print's location was with consistent the door being grabbed from behind the mirror. *See Id.* A veteran fingerprint examiner compared the print against defendant's known print, which was identified as a candidate by an Automated Biometric Identification System. *Id.*; 3RP 363, 373, 375-77, 391, 420; Ex. 51-53. The print discovered on the closet door matched a known sample of defendant's right ring finger. 3RP 377, 382; Ex. 51-53. Park did not know defendant, had never heard his name and never gave him permission to enter her home of 15 years. 2RP 197, 258. Swabs were taken of blood smeared on the closet wall. 3RP 347-48; Ex. 32. DNA testing was not ordered due to its cost combined with the need to reserve testing resources for violent crimes. 3RP 439, 441-42.

A search for defendant ensued. 3RP 429. Police met him at a Tacoma business. 3RP 429. They disclosed the fact of their burglary investigation without providing him any details about the crime. 3RP 431. Following a *Miranda* waiver, defendant reacted to photographs of the Parks' home by stating he did not recognize it and had not been inside. 3RP 431-37; Ex. 2-3, 22, 28, 32, 55. Defendant was asked how his fingerprint could be on a door inside the home. 3RP 437. His demeanor rapidly changed, becoming serious as he asked: "Is this about Brandon?" 3RP 437. Police had not mentioned Brandon O'Neal or another named

Brandon. They were not aware someone named Brandon might be involved. 3RP 438.

The same was not true of Mrs. Park. After the police left, she called Padgett believing O'Neal was responsible. 2RP 254-55, 269. Park asked Padgett to convince him to return papers stolen from the safe. 2RP 255, 270-71. *Coincidently*, that night Padgett first met defendant. 4RP 454, 460-61. She was "getting heroin from him." 4RP 454, 490-91. Padgett received her mother's call right before meeting defendant and O'Neal. 4RP 455-56, 490-92. She left to see what happened to the house. 4RP 457-58. Upon seeing blood inside her mother's closet, defendant "flash[ed]" into Padgett's mind with an *assumption* of his involvement. 4RP 458. The association was triggered by injuries Padgett just saw on his hands. 4RP 457-58. Padgett claimed she thought he had been fighting, for the back of his hands were swollen with new cuts on them. 4RP 458. O'Neal's hands were not injured. 4RP 493.

According to Padgett, she pleaded with O'Neal for the return of her mother's documents and some were left outside Padgett's home within days. 2RP 255-256; 4RP 459-60. Park's other property was not returned 2RP 256-57. Padgett claimed neither O'Neal nor defendant involved her in the burglary. 4RP 460. Yet she and O'Neal had been committing similar crimes with others, though she claimed defendant was not among them.

4RP 461-65, 485-87. She and O'Neal used the proceeds of their crimes to buy drugs. *See* 4RP 486-87.

C. ARGUMENT.

1. DEFENDANT'S CONVICTIONS ARE FIRMLY BASED ON A FINGERPRINT HE LEFT ON THE BEDROOM CLOSET, INJURIES CONSISTENT WITH BLOOD IN THE CLOSET, MANIFESTED CONSCIOUSNESS OF GUILT AND A DRUG-RELATED CONNECTION TO THE VICTIM'S THEN DRUG-ADDICTED ADULT DAUGHTER AND THE DAUGHTER'S EX-BOYFRIEND.

To convict defendant of residential burglary the State adduced evidence sufficient to prove that on or about the 28th day of October, 2014, he, or a person to whom he was an accomplice, entered or remained unlawfully in a Washington dwelling to commit a crime against property therein. RCW 9A.52.025; CP 39 (Inst. No. 5). A person acts with intent when acting with the objective or purpose to accomplish the crime. CP41 (Inst. 7). And a person enters or remains unlawfully in premises when he is not then licensed, invited or otherwise privileged to enter. CP 42 (Inst. 8). During that burglary, defendant committed first degree theft when he or a person to whom he was an accomplice obtained or exerted unauthorized control over the property of another exceeding $5,000 in value. CP 43-48 (Inst.9-13). Defendant was guilty as an accomplice by at least aiding with knowledge it would facilitate the crimes. CP 49 (Inst.14). "Aid" means all assistance. *Id.*

Equally reliable circumstantial evidence, direct evidence or some combination of the two is sufficient to support convictions for residential burglary and theft if it permits rational jurors to find the elements of those crimes beyond a reasonable doubt. ***State v. Moran***, 181 Wn.App. 316, 321, 324 P.3d 808 (2014); *see also* ***Holland v. United States***, 348 U.S. 121, 140, 75 S.Ct. 127 (1954):

> Admittedly, circumstantial evidence may [] point to a[n] incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances [] the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Courts defer to juror resolutions of the credibility and persuasive value of evidence. ***State v. White***, 150 Wn.App. 337, 342, 207 P.3d 1278 (2009). The Supreme Court has "emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of sufficiency review." ***Wright v. West***, 505 U.S. 277, 296, 112 S.Ct. 2482 (1992). Courts "keep in mind [] the prosecution need not rule out every hypothesis except [] guilt, and [a] court faced with [] conflicting inferences must presume [the jury] resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* Added to this presumption is a standard of review which accepts the State's evidence as true with any inferences reasonably drawn therefrom. ***White***, 150 Wn.App. at 342.

Defendant narrowly challenges proof of his identity as a principal or accomplice to the burglary and theft. His arguments should fail.

a. Defendant's challenge to the evidence proving his guilt wrongly relies on an exacting standard of review reserved for fingerprint-only cases.

It is not proper to apply the standard reserved for fingerprint-only cases when a defendant is connected to the crime by additional evidence. ***State v. Todd,*** 101 Wn.App. 945, 951-52, 6 P.3d 86 (2000) *overruled on other grounds by* ***State v. Rangel-Reyes***, 119 Wn.App. 494, 81 P.3d 157 (2003); ***United States v. Talbert***, 710 F.2d 528, 531-32 (9th Cir. 1983) (fingerprint *plus* drug-related link to burglarized home); ***United States v. Harris***, 530 F.2d 576, 579 (4th Cir. 1976) (print *plus* statement); ***United States v. Roustio***, 455 F.2d 366, 370 (7th Cir. 1972); ***United States v. Scarpellino***, 431 F.2d 475, 478 (8th Cir. 1970). In fingerprint-only cases, the State must prove the fingerprint could only have been impressed when the crime was committed. ***State v. Bridge***, 91 Wn.App. 98, 100-01, 955 P.2d 418 (1988) (fingerprint-only); ***Mikes v. Borg***, 947 F.2d 353, 357 (9th Cir. 1990); ***Borum v. United States,*** 380 F.2d 595 (D.C.Cir. 1967)). But in cases where a defendant is connected to a crime by a print *plus* some other evidence, the print is treated like all circumstantial evidence to be accepted as true with all reasonable inferences. *Id.*; ***Holland***, 348 U.S. at 140.

Defendant challenges the evidentiary support for his convictions through a misapplication of fingerprint-only cases. App.Br.7. Yet those convictions for burglarizing the Parks' home and stealing their valuables are based on much more. The jury was instructed on accomplice liability, so his conviction turned on proof he knowingly aided in the crimes. His proven opportunity, means, motive and manifested consciousness of guilt combined with the circumstances of the crimes to provide the necessary inferential link. *See* ***State v. White Eagle***, 138 Wn.App. 716, 729, 158 P.3d 1238 (2007); ***State v. Mace***, 97 Wn.2d 840, 843, 650 P.2d 217 (1982).

Proof of his opportunity to commit both crimes was persuasively but not exclusively established by the fingerprint he made on the bedroom closet door that concealed Park's stolen safe. He excluded the possibility of legitimate pre-crime contact with a closet in Park's home of 15 years when he denied ever entering the residence. 3RP 431-37; Ex. 2-3, 22, 28, 32, 55. A fact confirmed by Park and Padgett. 2RP 259, 265; 280; 4RP 454-55, 490. 492-93. His unlawful presence in the home during the burglary was corroborated by fresh cuts on the back of his swollen hands consistent with the blood smeared in the closet where destructive efforts proved necessary to extract the safe. 2RP 231-35, 236-37; 4RP 458; Ex. 30-32. These are injuries one would expect to find on the back of hands wielding a tool in the confined space between the damaged closet walls

and the floor mounted safe they protected. So defendant was quite literally caught red handed.

Further proof of his opportunity to commit the crimes exists in his presence with O'Neal, within driving distance of the victim's home, for the purpose of giving Padgett heroin right after the crimes. 4RP 454, 457-61. The inculpatory inference adhering to the suspiciously timed and purposed meeting was reinforced by O'Neal's subsequent return of papers taken from the safe within days of them being requested by Padgett on the victim's behalf. 2RP 255-256; 4RP 457-58. Together these circumstances do much to identify defendant as O'Neal's accomplice. But there's more.

Defendant had the means to commit a burglary precisely targeted at specific valuables in the home without a risky mid-day forced entry or after-hours home invasion. Through his connection to O'Neal and Padgett, defendant had access to house keys they retained after eviction, detailed information about when the Parks would be working away from the home as well as precise instructions on where to find their valuables. 2RP 199-202, 211-12, 275-76, 281, 283; 4RP 452-61, 490. Corresponding to these means was an inference of insider knowledge to be drawn from a burglary indicative of a thief who found what he wanted without looking. Only items in the closet impeding access to the safe were disturbed. Other areas of the home plainly capable of concealing valuables were left alone. 2RP 206; 224-25, 241; 3RP 327; Ex. 24. Meanwhile, defendant, an able bodied male, was physically capable of helping O'Neal pry the safe from its floor

mounting and carry the safe, large-screen television and computer out the door. Unlike defendant, O'Neal's hands were without apparent injuries after the burglary, supporting an inference defendant was the one who extracted the safe, just as his print on the displaced access door supports an inference he cleared the way for it first. 4RP 458, 493.

Defendant's motive for the crimes was equally plain. According to the Parks' unemployed, then heroin addicted, daughter, she was "getting heroin from" him just after the burglary. 4RP 454, 490-91. She and O'Neal had been committing property crimes with others to fund drug habits. 4RP 8486-87. Together with the proof of defendant's illegal presence in the Parks' home next to the stolen safe and the link to proceeds from that theft through his post-crime presence with O'Neal for a heroin handoff, one could readily infer Padgett and/or O'Neal traded access to and information about the Parks' valuables in exchange for the heroin Padgett was to be "getting" from defendant right after the crimes.

At trial, Padgett testified she assumed defendant was involved in the burglary. 4RP 458. Jurors capable of assessing her demeanor while testifying about her post crime drug-related meeting with him might have interpreted the statement as an indirect accusation, where the qualification betrayed reluctance to directly accuse a drug dealer amenable to breaking into homes. Inculpatory inferences of this kind typically adhere to cover-stories frequently provided by witnesses under a perpetrator's sway. See

State v. Hanson, 126 Wn.App. 267, 280-81, 108 P.3d 177 (2005). It was for the jury to sort truths, half-truths and lies.

Of the cases addressing challenges to the sufficiency of fingerprint evidence, defendant's case seems most analogous to ***Talbert*** in that both cases were mischaracterized as fingerprint only cases despite the presence of additional evidence, which combined with an incriminating fingerprint to support their convictions. Talbert claimed his murder conviction was exclusively based on the murder weapon bearing his print. ***Talbert***, 710 F.2d at 530-31. That description was rejected by the Ninth Circuit because Talbert had a drug-related connection to his victim that explained Talbert's awareness of valuable property likely to be in the victim's home. *Id.* at 531. While acknowledging the theoretical possibility their connection also supported the hypothesis Talbert coincidently touched the weapon while innocently wandering about the victim's premises prior to the crime, the court rightly found it to be a scenario capable of being soundly rejected as too remote. *Id.* at 531. The conviction was therefore affirmed according to the traditional test for assessing sufficiency, not the standard reserved for fingerprint-only cases. *Id.*

An inference defendant knew he burglarized the Parks' home finds overwhelming support in the destructive, disruptive, manner in which the safe was removed. His fingerprint was on the displaced closet door as if he was the one who made way for the safe. Personnel effects interfering with access to the safe were likewise thrown asunder manifesting a lack of

regard typical of a burglar but not an invited guest. Amid the damage done to the closet's walls was blood corresponding to fresh cuts on the back of defendant's swollen hands. In combination with the print, this proved him to be an active participant in the safe's removal under circumstances no reasonable person would perceive to be innocent. Yet one need not guess at his awareness of the criminal quality of his acts, for his initial reaction to being informed of the burglary investigation betrayed visible concern as he impulsively asked if it involved "Brandon" at a time when police were unaware of Brandon O'Neal's connection to the house. 3RP 437-38. This supports an inference defendant had special knowledge about the crime, and, when connected to his post-crime interactions with O'Neal, reinforces his tie to it through a manifested consciousness of guilt. Since defendant's guilt was based on far more than a fingerprint, the standard for fingerprint-only cases does not apply. His well-proved convictions should be affirmed pursuant to the traditional standard of review.

b. The convictions could be affirmed based on the fingerprint alone since it was impressed on a fixed closet door that concealed the safe stolen from Park's bedroom of 15 years.

Fingerprint evidence is alone sufficient to support conviction for a crime where jurors could reasonably infer from the circumstances the print could only have been impressed during the crime's commission. ***Todd***, 101 Wn.App. at 951. Circumstances material to the inference include the print-

bearing object's function, location and accessibility. *Id.*; ***Mikes***, 947 F.2d at 357-58. Fingerprint-only cases are distinguished according to whether the print was impressed on movable or fixed objects. ***Todd***, 101 Wn.App. at 951. When a print is the defendant's only link to the crime and is on a moveable object, the State must show it could only have been impressed during the crime. ***Bridge***, 91 Wn.App. at 100-01 (fingerprint on movable tool recently in stream of commerce). This test protects people against convictions for coincidentally touching objects later found at crime scenes. ***Bridge***, 91 Wn.App. at 100-01; ***Mikes***, 947 F.2d at 357-59 (fingerprint on turnstile handle previously accessible to the public). Still, convictions are affirmed where jurors could conclude the print-bearing object was not accessible to the defendant before a crime. *Id.* Even under this test the State "need not exclude all inferences or reasonable hypotheses consistent with innocence." *Id.* The record need only contain sufficient probative facts from which "a factfinder could reasonably infer a defendant's guilt under a reasonable doubt standard." *Id.*

Concerns about an innocent person's print turning up at a crime scene through a chance pre-crime encounter with property to which the person is not otherwise legitimately linked logically abates in fixed-object cases. ***State v. Lucca***, 56 Wn.App. 597, 603, 784 P.2d 572 (1990); ***Taylor v. Strainer***, 31 F.3d 907, 909-10 (9th Cir. 1994). For with the marked decrease in the probable truth of an innocent-contact hypothesis comes a corresponding increase in the probable truth of the incriminating inference

attending the unaccounted for presence of a person's fingerprint at a crime scene. *Id.* Review of fixed-object cases reveals this marked shift toward the probable truth of inculpatory inferences to be the distinction explaining why they require less corroboration to support convictions than is often demanded in moveable-object cases. *Id.* Convictions in fixed-object cases have been affirmed where the print-bearing object is fixed in a crime scene not readily accessible to the public or legitimately linked to the defendant. *Id.*; ***Taylor***, 31 F.3d at 909-10; ***Govt. of Virgin Islands v. Edwards***, 903 F.2d 267, 271 (3rd Cir. 1990); ***United States v. Bush***, 749 F.2d 1227, 1229-30 (7th Cir. 1984). Proof of such circumstances without more is sufficient to support a reasonable inference the fingerprint was impressed during the crime. *Id.*

Examples abound. Unlike this case, where the incriminating print was on a closet door in the victim's bedroom of 15 years, the print deemed sufficient to support the burglary conviction in ***Lucca*** was found on glass from a broken-out garage window enclosed by fencing. *Id.* at 598, 600-01. It was unknown if the print was on the inside of the window. *Id.* Nor was there direct evidence proving the print was made when the crime occurred. *Id.* Yet the victim did not know Lucca, never gave him permission to enter the home and nothing in the record could support an innocent account for the print's presence. *Id.* So "[t]he jury was entitled to conclude ... it [wa]s not reasonable [] Lucca [] made the fingerprint other than at the time of the burglary." *Id.*

Despite the more persuasive evidence of guilt in defendant's case following from the private character of the bedroom where his print was found, he claims to have been unfairly convicted since the evidence did not rule out the possibility he left his print on the closet during an earlier unknown trespass in her bedroom on some hypothetical occasion that the record cannot support. App.Br. 8. Unsurprisingly, defendant is not the first burglar to offer this argument against a valid conviction. The Third Circuit rejected the defense in ***Edwards***, where the incriminating print was left on louvers in the rear of a building located at the end of a dead-end road:

> Although it is true [] Edwards could have left the prints on the outside of the glass while [] trespassing in the backyard, evidence need not be inconsistent with every conclusion save ... guilt, provided it does establish a case from which the jury can find [] guil[t] beyond a reasonable doubt.

Edwards, 903 F.2d at 271.

Persuaded by ***Edwards***, the Ninth Circuit reached the same result in ***Taylor***, where a trial court, applying the reasoning defendant advances, wrongly concluded a print on a windowsill was inadequate to support a burglary-murder conviction as one could conceive of three hypotheses pointing to innocence, *i.e.*, it was impressed when Taylor *was a guest*, worked on the window or *engaged in earlier criminal activity*. ***Taylor***, 31 F.3d at 909. Each was unfounded, and therefore could not be a hypothesis of innocence sufficient to create reasonable doubt. *Id.* at 910. The doubt attending unsupported hypotheses of innocence is inadequate to invalidate

convictions even when unrebutted. *Id.* Argument to the contrary wrongly "assume[s] the prosecution's case must answer all questions and remove all doub[t], which, [] is not the law because that would be impossible []" *Id.* (quoting ***Borum v. United States***, 380 F.2d 595, 599 (D.C.Cir. 1967) (Burger, J., dissenting)). A fingerprint at the point of entry of a window Taylor would not have touched absent unusual circumstances was consistently deemed sufficient to support his conviction. *Id.*

The ***Taylor*** court refused to extend its decision in ***Mikes*** (the case on which both ***Bridge*** and defendant rely) to cover prints found in places not accessible to the public and "can be explained in a manner consistent with innocence only through far-fetched, unsupported speculation []." *Id.* at 909-10. Instead, fingerprint evidence supports conviction even when it is "theoretically possible [a] defendant left his prints but did not commit the crime." *Id.* at 910; *accord* ***State v. Jacobs***, 121 Wn.App. 669, 682, 89 P.3d 232 (2004) (print on meth-related item in bag with cooker used for meth production supported manufacturing conviction); ***Bush***, 749 F.3d at 1229 (possibility of pre-crime contact did not support reasonable doubt).

Accordingly, defendant's unsupported argument: "[h]e may have improperly accessed [Park's] bedroom and touched the closet door on another day" cannot undermine the reasonableness of the jury's decision to convict him as charged. The incriminating presence of his print on the safe concealing closet would establish his guilt for these crimes without more. Yet there is more, so much more it aggregates to deprive his comparison

of this case to fingerprint-only cases of any merit. So his convictions for burglarizing the Parks' home and stealing their hard earned and affectionately gifted valuables should be affirmed.

2. DEFENDANT'S PREMATURE REQUEST TO PASS COSTS ALONG TO OUR TAXPAYERS SHOULD BE DENIED AS A COST BILL HAS NOT BEEN SUBMITTED AND THERE IS NO INJUSTICE IN A CONVICTED BURGLAR REPAYING THE PUBLIC FOR HIS APPEAL.

a. This objection is not ripe for review.

Review of appellate costs should await an objection to a bill. RAP 14.4-14.5; ***State v. Sinclair***, 192 Wn.App. 380, 389-90, 367 P.3d 612 (2016); ***State v. Caver***, ___ Wn.App. ___, ___ P.3d ___ (2016) (Slip No. No. 73761-9-I; 2016 WL 4626243, at *5); ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000); ***State v. Blank***, 131 Wn.2d 230, 243-44, 930 P.2d 1213 (1997). Defendant should not be preemptively insulated from paying our community the money it advanced for his appeal.

b. Money defendant comes into would be well directed to repayment of costs this community paid on his behalf.

RCW 10.73.160(1) empowers appellate courts to impose appellate costs on adult offenders. Imposition of such costs has been historically considered an appropriate means of ensuring able bodied offenders "repay society for [] what it lost as a result of [their] crime." ***State v. Barklind***, 87 Wn.2d 814, 820, 557 P.2d 314 (1976). More recently, this community-

centric concept of restorative justice has been subordinated to an offender-centric concern for the difficulty anticipated to attend repayment. ***State v. Blazina***, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015). Ability to pay "is not necessarily an indispensable factor." ***Sinclair***, 192 Wn.App. at 389; ***Caver***, *supra.*

According to the record developed in this case, defendant is a man able bodied enough to shoot at people from a moving vehicle, burglarize homes, assault people, steal their valuables, firearms and cars, flee from an accident and maliciously harass. He can even be counted on to deliver heroin after injuring himself during a burglary. Directing any money he earns to repaying this community the costs it incurred on his behalf is far more just than shifting them to hardworking, overburdened taxpayers, like defendant's victims, who rarely, if ever, avail themselves of the judicial resources recidivists like defendant so regularly consume.

D. CONCLUSION.

Defendant has misapplied the fingerprint-only standard of review to convictions supported by a print *plus* an array of incriminating facts and circumstances that understandably persuaded twelve qualified citizens to convict him as charged. It is premature to decide whether he should be insulated from the costs of this appeal, but nevertheless unjust to shift that

burden away from a recidivist felon to a community that has borne the brunt of his unrelenting criminal impulses for the past 14 years.

RESPECTFULLY SUBMITTED: DECEMBER 12, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/12/16 [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

December 12, 2016 - 2:30 PM

Transmittal Letter

Document Uploaded: 5-488027-Respondent's Brief.pdf

Case Name: State v. Jesse Leo Arnestad

Court of Appeals Case Number: 48802-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

SCCAttorney@YAHOO.COM